82-1045

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

CHRISTIAN MATTHEW NEWTON and
JOHN JACKSON MILLER TRUXELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision below, validating the use of co-conspirator hearsay statements as evidence against Petitioners, conflicts with other appellate decisions and results in a deprivation of due process where there was a complete absence of substantial, independent evidence that Petitioners were members of the charged conspiracy?

2. Whether the decision below affirming Petitioners' convictions is contrary to prevailing law and results in a deprivation of constitutional rights, where the evidence did not sufficiently establish their knowing participation in the charged crimes?

3. Whether a sentencing court's mechanical imposition of maximum sentences without individualized

consideration of relevant behavior characteristics requires resentencing before an impartial judge?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioners, their families, and the United States of America.

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NO.

IN THE
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OCTOBER TERM 1982

CHRISTIAN MATTHEW NEWTON and
JOHN JACKSON MILLER TRUXELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petitioners, CHRISTIAN MATTHEW NEWTON and JOHN JACKSON MILLER TRUXELL, respectfully pray that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on August 5, 1982, and October 19, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in the Appendix attached hereto and is reported as United States v. Roper, 681 F.2d 1354 (11th Cir. 1982). The Court of Appeals denied the petition for rehearing in a per curiam order dated October 19, 1982, which is also reproduced in the Appendix. The District Court did not render any written opinions specifically directed to this case.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered August 5, 1982. The appellate court then entered an order staying issuance of the mandate pending the timely filing of a certiorari petition and disposition thereof by this Court. This petition is filed within the

authorized time period. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No person... shall be deprived of life, liberty, or property without due process of law...

Title 21 U.S.C. §841:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;...

Title 21 U.S.C. §846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Christian Matthew NEWTON and John Jackson Miller TRUXELL, along with co-defendants Jerry Lee Harvey, Tyrus Ramond Cobb, James Morrow Roper and Geraldine Kelleher Martin, were charged by a federal grand jury in the Southern District of Alabama with conspiracy to possess and distribute approximately 100,000 methaquaalone tablets and the substantive offense of possession and distribution of the drugs. 21 U.S.C. §§846, 841(a)(1). Before the trial, the district court granted Harvey's motion for a severance from the other defendants and at the conclusion of the government's case-in-chief judgments of acquittal were entered for codefendants Martin and Roper as to the substantive charge. The jury then found all of the defendants guilty of conspiracy and

TRUXELL, NEWTON and Cobb guilty of possession with intent to distribute. NEWTON and TRUXELL received maximum sentences of five years on each count, to run consecutively, coupled with total fines of $30,000.

The government's investigation of this case began with Frank Acuian, a cooperating informant for the Drug Enforcement Administration (DEA), who was approached by Ty Cobb for the purpose of soliciting potential buyers for large amounts of quaaludes. Convinced that Cobb was capable of producing the drugs, Acuian contacted the Baton Rouge Police Department, which in turn notified the DEA. Acuian met with DEA agents and agreed to assist in making a drug bust. He then began negotiating for the sale of a large amount of quaaludes. An undercover Louisiana state trooper was introduced

to Cobb as the "money man" and, as a gesture of good faith, Cobb was shown $200,000.00 in cash.

The parties then decided on Mobile, Alabama as the site of the sale. Cobb and Martin, his girlfriend, then checked into the Howard Johnson's Motor Lodge (Howard Johnson's) in Mobile and were soon joined by Harvey, who was to assume an increasingly important role in the negotiations.

After a series of meetings at which the price and method of exchange were settled, Harvey made airline reservations for "Jack Wilson" to fly from Atlanta to Mobile. "Wilson", it was explained, was to transport the purchase money to Atlanta after the exchange. Harvey drove to the airport to pick up "Wilson", who turned out to be the defendant Roper. On the way back to the hotel, Harvey made a phone call

in Roper's presence to Harvey's "Florida connection" at a Travelodge in Ocala, Florida. The person Harvey called was named "Steve." Although NEWTON and TRUXELL were alleged to be the Florida connection, they were never observed at or connected to the Travelodge motel.

The next day, when the deal was ready to be consummated, a call was placed to the Travelodge in Ocala to request delivery of the pills. The first observation of NEWTON and TRUXELL came as they drove a white Chevrolet into the Howard Johnson's parking lot. The only connection between these two men and the Ocala Travelodge is that the car driven by NEWTON and TRUXELL was the same one registered to occupants at the Travelodge who had checked out the day earlier. Upon their arrival at the Howard Johnson's, four sealed cartons were quickly transferred to Acuian's

car. NEWTON and TRUXELL then conferred with Cobb for a few minutes before driving away. They were arrested on the highway and a road map was seized from TRUXELL's person.

Meanwhile, back at the Howard Johnson's, teams of agents began arresting the other conspirators. The sealed boxes which NEWTON and TRUXELL had delivered contained 105,300 methaquaalone tablets.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, VALIDATING THE USE OF COCONSPIRATOR HEARSAY STATEMENTS AS EVIDENCE AGAINST PETITIONERS, CONFLICTS WITH OTHER APPELLATE DECISIONS AND DEPRIVES PETITIONERS OF DUE PROCESS WHERE THERE WAS A COMPLETE ABSENCE OF SUBSTANTIAL, INDEPENDENT EVIDENCE THAT PETITIONERS WERE MEMBERS OF THE CHARGED CONSPIRACY.

NEWTON and TRUXELL were charged with, and convicted of,

conspiring to possess and distribute 100,000 methaqualone tablets and the substantive offense of possession and distribution of the contraband. The evidence against them was wholly circumstantial, as recognized by the Eleventh Circuit, 681 F.2d at 1359, and included consideration of certain coconspirator hearsay statements. In determining whether such statements can be admitted as evidence against a particular defendant, the proof apart from the use of the hearsay statements must establish by a preponderance of the evidence the existence of the charged conspiracy and a defendant's participation therein. E.g., United States v. James, 590 F.2d 575 (5th Cir. en banc), cert. denied, 442 U.S. 917 (1979); United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977).

The appellate opinion in this

case refused to recognize the fact that coconspirator hearsay was admitted against these Petitioners. 681 F.2d at 1358-1360. This portion of the Eleventh Circuit opinion is clearly in conflict with numerous federal appellate decisions which define coconspirator hearsay statements as out of court statements by a coconspirator of a party made during the course and in furtherance of the conspiracy. F.R.E. 801(d)(2)(E); United States v. DiGregorio, 605 F.2d 1184 (1st Cir.), cert. denied, 444 U.S. 937, 100 S.Ct. 287 (1979); United States v. DiRodio, 565 F.2d 573 (9th Cir. 1977); United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641 (1977). Because statements of the alleged coconspirators, such as references to the "Florida connection" and the

existence of the refrigerated truck containing contraband, contributed to the quantum of proof against NEWTON and TRUXELL, the evidence could not be considered until the predicate elements were satisfied. The appellate opinion's conclusion in this regard is erroneous and constitutes an injustice. This Court ought to correct the matter.

The Fourth Circuit decision in United States v. Stroupe, 583 F.2d 1063 (4th Cir. 1976), is perhaps representative of prevailing legal authority on this point. There, the court ruled that the independent evidence connecting the defendant to a conspiracy was inadequate and precluded admission of any coconspirator statements. Wayne Stroupe was convicted, on a conspiracy theory, of distributing amphetamines. The evidence showing Stroupe's involvement in an

otherwise ongoing drug scheme was based on the testimony of undercover agents who testified that on the day in question the seller told them he was getting the drugs from "Wayne", and then proceeded to place a call to a "Wayne" to arrange the sale. The seller then went to Stroupe's home and emerged with drugs.

The government argued that this evidence was sufficient to prove the conspiracy so that later statements tying Stroupe to the conspiracy were admissible. The appellate court disagreed, finding that there was no showing that the call was actually made to Stroupe, or was not merely feigned to use him as an unwitting dupe. Similarly, with reference to the emergence from Stroupe's house with the drugs, the court noted that the drug may have been concealed in the seller's pocket all

along, with the visit to the house being a subterfuge to divert attention from the seller's home or his source of supply.

The opinion issued in the present case fails to recognize this concept of "substantial connection" to an ongoing conspiracy. If this decision is permitted to stand, there is no doubt that it will radically rewrite federal precedent with respect to admission of coconspirator statements. For, all that is needed for proof to comport with the court's decision is the mere existence of a conspiracy without any precise showing of an accused's role therein. Due process requires that this Court correct this error.

II. THE DECISION BELOW AFFIRMING PETITIONERS' CONVICTIONS IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF CONSTITUTIONAL RIGHTS WHERE THE EVIDENCE DID NOT SUFFICIENTLY ESTABLISH THEIR KNOWING PARTICIPATION IN THE CHARGED CRIMES.

In all criminal cases, the government has the responsibility of proving every element of the crime charged beyond a reasonable doubt. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). This burden is not dependent upon the status of the prosecuting authority, Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) (due process requires same standard of proof in state criminal proceedings), or the status of the defendant. In Re Winship, supra, (beyond a reasonable doubt burden is applicable in adult and juvenile prosecutions). Yet, in the present case the Eleventh Circuit has imposed an altogether new standard of criminal

responsibility in situations involving mere transporters of contraband under conditions which amount to nothing more than ignorant involvement.

It is submitted that this emerging standard is completely erroneous and contrary to well-established notions of criminal culpability. The conclusion of the appellate court ought to be reviewed for the very simple reason that, if upheld, this standard will impose criminal liability upon every individual who, without being cognizant of any illegal dealings, finds himself unknowingly immersed in the outer fringes of the drug trade. Petitioners should not be made to suffer because of the prevalent societal dissatisfaction with illegal narcotics.

The situation presented for review to this Court is, in a way,

unique; yet, it is controlled by a substantial body of law which, unfortunately, was not correctly applied to the facts. The record of the trial and the opinion of the Eleventh Circuit reveal that Petitioners' sole act of illegality was in delivering four sealed cardboard boxes to the Howard Johnson's motel. There was no evidence that they knew the contents thereof; there was no evidence that they had any prior dealings with the coconspirators. In fact, the proof amply supported Petitioners' contention that they were unwittingly duped into assisting the drug principals by delivering what they believed to be harmless airplane parts.

The court's decision failed to account for the opinion of United States v. DeSimone, 660 F.2d 532, 537 (5th Cir. 1981), and in so doing conflicts therewith. There, DeSimone was charged with

and convicted of various offenses including a scheme to import marijuana into the United States. The evidence against DeSimone showed his close association with persons involved in a criminal enterprise. He was arrested after his attempted flight in the middle of the night from an automobile ditched in a remote area near the Greensboro airport, where a marijuana unloading operation was taking place. The government's theory there, as here, was that of righteous bewilderment that anyone in such a remote area could not be connected to the conspiracy. This caused the court to make the following observation:

> This evidence certainly arouses suspicion, but does it prove beyond a reasonable doubt that DeSimone conspired to import and distribute marijuana. We think not. Obviously, appellant's presence was highly suspicious, but this is not a

> substitute for evidence sufficient to prove beyond a reasonable doubt. Although it is certainly possible -- maybe even probable -- that [the appellant] was involved in the conspiracy, such speculation does not constitute proof beyond a reasonable doubt, and juries 'must not be permitted to convict on suspicion and innuendo.'

Another case which deserves comment is United States v. Scott, 678 F.2d 606 (5th Cir. 1982). There, the Fifth Circuit reversed the convictions of several defendants charged with conspiracy to import marijuana because the proof established merely that they were present on board a vessel which rendezvoused with a drug-laden boat. Commenting that the defendants "may have simply been hired 'to unload a vessel,'" the court held that the "appellants were more like such passengers in an automobile containing concealed contraband as we have in other cases

found innocent of possession." Id. at 611.

The very same observations ring true in this case. As with DeSimone, both NEWTON and TRUXELL found themselves in a compromising situation that might, at first glance, seem to defy reasonable explanation. However, upon the closer inspection that inevitably occurs on appellate review, a reasonable explanation existed inconsistent with a theory of guilt. That view is simply that "Steve" placed Petitioners in a situation where they unknowingly transported boxes of quaaludes to the ultimate destination in Mobile. There is no testimony to show that NEWTON and TRUXELL, "while still in the Ocala Travelodge, stayed in constant contact with the other members of the party in Mobile." 681 F.2d at 1360. The evidence only shows that the unknown

people who rented the particular room at the motel were in communication with the conspirators and that those people checked out of the room the day after NEWTON and TRUXELL were arrested and taken into custody. Thus, the proof establishes that someone <u>else</u>, not NEWTON or TRUXELL but probably "Steve", was the organizer of this conspiracy; it is this person who duped Petitioners into participating.

It is imcumbent upon this Court to review the standard announced by the Eleventh Circuit with regard to sufficiency of proof in cases involving transporters of contraband. Petitioners, to be sure, did not act with an abundance of caution; but neither did they knowingly engage in criminal conduct. Because the court below has totally disregarded the burden of proof imposed by the Constitution upon the

prosecution and has affirmed the convictions on the basis of inadequate understanding of the facts and the law, this Court should grant a writ of certiorari and require the Eleventh Circuit to conform to the mandate of this Court, as issued in Jackson and Winship, that requires a reversal of any judgment based on evidence insufficient to establish to a reasonable jury guilt beyond a reasonable doubt.

III. A SENTENCING COURT'S MECHANICAL IMPOSITION OF MAXIMUM SENTENCES WITHOUT INDIVIDUALIZED CONSIDERATION OF RELEVANT BEHAVIOR CHARACTERISTICS REQUIRES RESENTENCING BEFORE AN IMPARTIAL JUDGE.

Petitioners received the maximum possible punishment for their convictions. The sentencing procedure utilized by District Judge Hand was not a careful analysis of the circumstances

of the case and the individual backgrounds of Petitioners, but rather was simply a mechanical imposition of the maximum sentence in order to avoid any resentencing limitations should the defendants be successful on appeal.[1/] The Eleventh Circuit, while disagreeing with Petitioners that the trial judge's actions did not constitute individualized sentencing discretion, did remand the case for a resentencing hearing before the same judge because of what it perceived as an improper conditional sentencing. We submit that, while resentencing is in order, that act

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[1/] Judge Hand commented as follows:

> If the matter is confirmed [sic] on appeal, I will entertain a Rule 30. If the matter is reversed on appeal, then that [maximum sentences] will allow the next judge that tries the case a free hand to impose what sentence he feels is appropriate in this case.

must be done by another, impartial judge.

The Eleventh Circuit opinion conflicts with several other federal Circuits which, when remanding a case for resentencing because of a judge-initiated sentencing error, required that resentencing occur before a different judge. In United States v. Schwarz, 500 F.2d 1350, 1352 (2d Cir. 1974), the district judge imposed a sentence while employing "a fixed and mechanical approach... rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis." Because of this, the court directed

> that the case be reassigned for sentence by another judge "both for the judge's sake and the appearance of justice..."

Id. In United States v. Long, 656 F.2d 1162 (5th Cir. 1981), resentencing was

ordered before a different judge when the initial jurist failed to consider a presentence report and stated that no report could favorably impact on the appropriate sentence perceived by the court. Also, in United States v. Murphy, 530 F.2d 1, 2 (4th Cir. 1976), where a case was remanded for resentencing in order to provide an opportunity for allocution, the court directed as follows:

> Because of the district judge's failure to accord the appellant the right of allocution, we reverse and remand for resentencing before a different district judge. In view of our disposition of the matter, we need not presently consider the other assignments of error.

A similar result was ordered in United States v. Navarro-Flores, 628 F.2d 1178, 1185 (9th Cir. 1980), for identical reasons:

> ... we are of the opinion that "both for the judge's sake,

and the appearance of justice", see Mawson v. United States, supra at 31, an assignment to a different judge for resentencing is "salutary and in the public interest", see United States v. Bryan, 393 F.2d 90, 91 (2d Cir. 1968). Cf. United States v. Murphy, 530 F.2d 1 (4th Cir. 1976). In a resentencing here on the plea of guilty, the gain in preserving the appearance of fairness outweighs the countervailing considerations of duplicated effort. Where there is no proof of personal bias requiring recusation "our remand does not imply any personal criticism of the sentencing judge". United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977).

The Eleventh Circuit decision fails to account for these interests. Its conclusion conflicts with the decisions cited above and is dangerous precedent for our criminal justice system. In addition to meting out justice in a fair manner, it is imperative that the judiciary be perceived as being fair and unbiased in

appearance. The Eleventh Circuit opinion does not convey that posture. This Court must correct the injustice.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18 day of December, 1982, three copies of the Petition for Writ of Certiorari were delivered by mail to the Solicitor General, Department of Justice, Washington, D.C. 20530, and to the United States Attorney's Office, P.O. Drawer E, Mobile, Alabama 36601.

BENEDICT P. KUEHNE

BENEDICT P. KUEHNE

UNITED STATES of America,
Plaintiff-Appellee,

v.

James Morrow ROPER, Christian Matthew Newton, John Jackson Miller Truxell, Defendants-Appellants.

No. 80-7880.

United States Court of Appeals,
Eleventh Circuit.

Aug. 5, 1982.

Before GODBOLD, Chief Judge,

MERRITT*, and HENDERSON, Circuit Judges.

HENDERSON, Circuit Judge:

The appellants, James Morrow Roper, Christian Matthew Newton and John Jackson Miller Truxell, along with co-defendants, Jerry Lee Harvey, Tyrus Ramond Cobb and Geraldine Kelleher Martin, were charged by a federal grand jury in the Southern District of Alabama with conspiracy to possess and distribute approximately 100,000

methaquaalone tablets and the substantive offense of possession and distribution of the drugs. 21 U.S.C. §§846, 841(a)(1). Before the trial, the district court granted Harvey's motion for a severance from the other defendants and at the conclusion of the government's case-in-chief judgments of acquittal were entered for codefendants Martin and Roper as to the substantive charge. The jury then found all of the defendants guilty of conspiracy and Truxell, Newton and Cobb guilty of possession with intent to distribute. Cobb and Martin are not parties to this appeal.

Frank Acuian, a cooperating informant for the Drug Enforcement Administration (DEA), was approached by Ty Cobb, who was soliciting potential buyers for large amounts of quaaludes. Convinced

that Cobb was capable of producing the drugs, Acuian contacted the Baton Rouge Police Department, which in turn notified the DEA. Acuian met with DEA agents and agreed to assist in making a drug bust. He then began negotiating for the sale of a large amount of quaaludes. An undercover Louisiana state trooper was introduced to Cobb as the "money man" and, as a gesture of good faith, Cobb was shown $200,000.00 in cash. The parties then decided on Mobile, Alabama as the site of the sale. Cobb and Martin, his girlfriend, then checked into the Howard Johnson's Motor Lodge (Howard Johnson's) in Mobile and were soon joined by Harvey, who was to assume an increasingly important role in the negotiations. After a series of meetings at which the price and method of exchange were settled, Harvey made airline reservations for "Jack Wilson"

to fly from Atlanta to Mobile. "Wilson", it was explained, was to transport the purchase money to Atlanta after the exchange. Harvey drove to the airport to pick up "Wilson", who turned out to be the appellant Roper. On the way back to the hotel, Harvey made a phone call in Roper's presence to Newton and Truxell - Harvey's "Florida connection" - who were staying in a Travelodge in Ocala, Florida. The next day, when the deal was ready to be consummated, a call was placed to the Travelodge in Ocala to request delivery of the pills. Newton and Truxell then checked out of the Travelodge and drove to Mobile. Upon their arrival at the Howard Johnson's, four sealed cartons were quickly transferred to Acuian's car. Newton and Truxell then conferred with Cobb for a few minutes before returning to Florida. They were

arrested on the highway and a road map was seized from Truxell's person. Meanwhile, back at the Howard Johnson's, teams of agents began arresting the other conspirators. The sealed boxes which Newton and Truxell had delivered contained 105,300 methaquaalone tablets. Roper now attacks his arrest and the subsequent seizure of evidence used against him. All three appellants claim that the independent evidence of conspiracy was not sufficient to permit the use of co-conspirators' hearsay statements and that the evidence failed to sustain the jury verdicts. The appellants additionally challenge the procedure employed by the trial judge in determining their sentences.

Roper contends that the district court's refusal to suppress airline tickets and a pistol found in his motel

room violated his constitutional rights because his arrest and subsequent search were made without first procuring warrants. Armed with the knowledge that Roper, then using the alias "Jack Wilson", was the man who flew to Mobile to transport the purchase money back to Atlanta, the agents had probable cause to make the arrest. The arrest, however, was effectuated in a somewhat unusual manner. Acting without a warrant, Agent Gustafson telephoned Roper's room and advised him that "there were armed agents outside of his room and for his own safety and for everyone else's to step outside into the hall, and that he was under arrest." Record, Vol. II at 23. Roper stepped into the hallway with his hands up, was briefly "patted down" for weapons, handcuffed, and immediately escorted back inside the room. Before warning Roper of his

rights in accordance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), Gustafson asked him if he had any weapons. Roper replied that a handgun was in an unlocked metal brief case on top of the dresser. A loaded pistol was taken from the metal container and Roper was then advised of his Miranda rights. At that point, the agents asked Roper if he had any identification. He replied that his identification was inside a zippered shoulder bag lying on a table and told the agent to "go ahead" when asked for permission to open the bag. Record, Vol. II at 34. Inside the shoulder bag were airline tickets which had been used for the flight from Atlanta to Mobile issued to "J. Wilson." Roper's statement concerning the pistol, the weapon itself and the airline tickets were all introduced as evidence against

him at trial.[1] Record Vol. III at 499, 500, 504, 505. Roper assigns as error a Miranda violation, improper seizure of the pistol and an invalid search of the

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[1] In denying Roper's motion to suppress, the district court addressed only the issue of probable cause and the legality of the warrantless arrest. The court concluded that probable cause had been shown and that the warrantless arrest was proper because it occurred in a public place (the hallway). Record Vol. II at 194; United States v. Watson, 423 U.S.411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976). It is now clear that warrantless arrests in a suspect's home may be effected only under exigent circumstances, Payton v.New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), and that Roper's use of his motel room strictly for lodging insures the same expectation of privacy as if it were his home. United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982). Here, the Payton rationale cannot be avoided by an instruction that the defendant is surrounded by armed agents and should come out of his room "for his own safety." The record reveals, however, that the simultaneous multiple arrests at the conclusion of the drug transaction and the legitimate fear that Roper would escape, Record, Vol. II at 31, 32, create sufficient exigent circumstances to make the warrantless arrest proper even under Payton.

shoulder bag. There is no necessity to address the purported infringement of Roper's fourth and fifth amendment rights because we find that the search of the briefcase and shoulder bag were incident to his arrest and even if the search was tainted,[2/] the evidence is admissible under the "inevitable discovery" exception to the "fruit of the poisonous tree" doctrine.

In Wong Sun v. United States,

2/ Because of our disposition of this issue, we do not consider the propriety of Roper's consent, given at gunpoint, to search the shoulder bag. See United States v. Phillips, 664 F.2d 971 (former 5th Cir. 1981). Nor must we decide if an inquiry of the suspect concerning a nearby weapon qualifies as an "interrogation" so as to implicate Miranda safeguards. See Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980) (defining "interrogation" as "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (Footnotes omitted.))

371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court held that the exclusionary rule requires suppression of "fruits" obtained "as a direct result" of an illegal search or an invalid interrogation. The Court noted, however, that evidence is not "fruit of the poisonous tree" if it is not obtained "by exploitation of the illegality" but is come at "instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun, 371 U.S. at 488,83 S.Ct. at 417. Recognizing that the purpose behind the exclusionary rule is to deter police misconduct and bar untrustworthy evidence, e.g. Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the former Fifth Circuit Court of Appeals acknowledged that neither function would be served by excluding evidence which would have been

discovered regardless of any alleged unconstitutionality. United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980). The Brookins Court noted that this "inevitable discovery" exception is misnamed in that it is not only applicable where discovery was "inevitable", but also where there was a "reasonable probability" that the evidence would have been discovered by legal means. Brookins, 614 F.2d at 1048. We have no doubt that the evidence seized here would have been discovered independently of any alleged unconstitutional questioning or search. It is obvious from the circumstances that DEA agents were initially preoccupied with ascertaining Roper's true identity and if he was armed. The agents knew that other conspirators were in possession of weapons, Record, Vol. III at 473, and

that Roper was the "money man" whose assignment was to transport $185,000.00 in cash. It is unreasonable to think that the agents would not have conducted a search of Roper and the area within his control immediately after the arrest. See Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). This conclusion gives rise to the next problem - the constitutionality of such a search.

Police officers may search an arrested person and" the area into which [he] might reach in order to grab a weapon or evidentiary items," Chimel v. California, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), and may open containers found within that area. New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981); United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

Here, however, the arrest occurred in the hall and the items seized were in close proximity to Roper after he was escorted back into his room. Record, Vol. III at 499, 504. In Vale v. Louisiana, 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970), the Supreme Court held that officers could not conduct a lawful search incident to arrest of a suspect's house when the arrest took place on the front steps. In reaching its decision, the Court declined "to hold that an arrest on the street can provide its own 'exigent circumstances' so as to justify a warrantless search of the arrestee's house." Vale, 399 U.S. at 35, 90 S.Ct. at 1972. Here, exigent circumstances other than the mere arrest caused the agents to escort Roper back into his room. Roper, Martin, Harvey and Cobb, all staying in rooms on the same hall, were apprehended

simultaneously by teams of police officers. Record, Vol. II at 24,Vol. III at 494. Because the hallway had not been secured, staff members and other guests were in the immediate area. Record, Vol. II at 35, Vol. III at 494, 496. The obvious peril created by attempting to arrest a suspected drug dealer in a hallway where other arrests are taking place while bystanders looked on sufficiently established exigent circumstances to justify returning Roper to his room.[3/] In this situation, the officers were authorized to search the

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3/ Roper asserts that the police should have taken him into a surveillance room "directly across the hall." Brief of Appellant at 26. The record shows, however, that this room was four doors away. Record, Vol. II at 41. In any case, the arrest transpired quickly and "the existence of alternative approaches does not imply that what actually occurred was unreasonable." United States v. Mason, 523 F.2d 1122, 1126 (D.C. Cir. 1975).

area within his control for weapons and evidence. See Washington v. Chrisman, ____ U.S. ____, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982). Because such a search would have materialized had not the police learned of the location of the weapon and Roper's identification by other means, the district court correctly refused to suppress the pistol and airline tickets.[4/]

Finding that the seized physical evidence was properly admitted does not, however, dispose of the question of the admissibility of Roper's

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[4/] As the District of Columbia Circuit observed, "Of course, Chimel does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a 'search incident to arrest.'" United States v. Mason, 523 F.2d 1122, 1126 (D.C. Cir.1975). We are not faced with this type of extreme conduct in this case. The district court explicitly found that the arresting agents acted in good faith. Record, Vol. II at 194.

statement concerning the weapon which was arguably admitted in violation of Miranda, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.[5] We need not belabor this point. Roper's statement that a weapon was in the briefcase was only proof of his possession of the weapon - a fact that was not in dispute at trial and which, in light of the overwhelming circumstances surrounding the pistol's discovery, could not have been in controversy. Under these facts, if the admission of Roper's statement violated the precepts of the Miranda decision, such an error was harmless beyond a reasonable doubt. See Germany v. Estelle, 639 F.2d 1301 (5th Cir.), cert. denied ____ U.S. ____, 102 S.Ct. 290, 70

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[5] As previously stated, we do not inquire into the propriety of asking a suspect whether he is armed without first informing him of his constitutional rights.

L.Ed.2d 140 (981); Harryman v. Estelle, 616 F.2d 870 (5th Cir.) (en banc), cert. denied, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980).

All the appellants contend that the trial court erred in admitting co-conspirators' hearsay statements against them and claim that the evidence produced at trial was insufficient to uphold their convictions. It is settled law that a trial court can only admit co-conspirators' hearsay statements if it finds substantial evidence, independent of the statements sought to be introduced, showing that the defendant was a member of the conspiracy and that the statements were made in furtherance of the conspiracy. E.g. United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982); United States v. Mesa, 660 F.2d 1070 (former 5th Cir. 1981); United States v.James, 590 F.2d 575 (5th Cir.)

(en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). The district court's assessment of the James issue is a finding of fact which will be overturned only if it is clearly erroneous.[6] E.g., United States v.Bulman, supra; United States v. Hawkins, 661 F.2d 436 (former 5th Cir. 1981). In determining whether the jury's verdict is supported by the evidence, we look to see whether the evidence, viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 62 S.Ct.

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[6] Roper also complains that the district court did not reconsider its initial James determination at the close of all the evidence. The second James inquiry is required only "on appropriate motion." United States v. James, 590 F.2d at 582. Because Roper made no such motion at the trial, he cannot now object to the trial court's failure to reconsider its initial ruling sua sponte. United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982).

457, 86 L.Ed.2d 680 (1942), would permit a reasonable jury to find guilt beyond a reasonable doubt. United States v. Bell, 678 F.2d 547 (former 5th Cir. 1982) (en banc). Since hearsay evidence was admitted against Roper, we first consider if the non-hearsay evidence comported with the James standard and if so, whether all of the evidence, hearsay and non-hearsay, was sufficient to sustain his conviction. See United States v. Mesa, supra. On the other hand, the government's case-in-chief against Newton and Truxell relied exclusively on circumstantial evidence. We view the evidence against them only in an effort to ascertain the validity of their convictions.

We begin by noting the importance to this case of a shadowy figure using the alias "Steve." Steve was apparently never apprehended and his

role in the conspiracy can only be gleaned from telephone records, messages and one-half of a telephone conversation. Harvey remained in constant contact with Steve by telephone. Harvey's half of one such conversation was overheard by an undercover agent and it was clear that the purpose of the call was to report on the progress of the negotiations. Record, Vol. II at 116. Cobb received messages to call Steve and Roper also called him from his hotel rooms in Atlanta and Mobile. The map seized from Truxell disclosed a handwritten notation listing "Steve's" telephone numbers as the same two numbers used by Harvey to reach the mysterious associate. The fact that all of the conspirators except Martin, who played a minor role, remained in constant contact with a third party who obviously knew of the conspiracy and

apparently directed its execution is damaging circumstantial evidence indicating complicity by all in the illegal enterprise.

Other evidence adduced during the pretrial James hearing revealed that Cobb made reservations for Roper, using the alias "Jack Wilson," to fly to Mobile the day before the consummation of the illegal transaction. The confidential informant, acting under Cobb's instructions, rented a room for Roper under the name "Wilson" at the Howard Johnson's, the site of the drug sale negotiations. When arrested, Roper had in his possession airline tickets in the name of "J. Wilson." He was armed with a handgun and attended a meeting with Harvey and Cobb in Harvey's room. He was also present when Harvey placed a phone call to Newton and Truxell, who were then staying at the Travelodge in

Ocala. In view of these facts, there was adequate independent evidence to authorize the admission of coconspirators' hearsay statements against Roper. See United States v. Bulman, supra. According to the hearsay testimony, it was Roper's responsibility to transport the money generated by the sale to Atlanta. Record, Vol. III at 387. The evidence sufficiently established his guilt.

In addition to the map containing the phone numbers for "Steve," there was evidence that Newton and Truxell, while still in the Ocala Travelodge, stayed in constant contact wth the other members of the party in Mobile. Gov't Exhibits 1, 3, 4, 5, 23. They also called the Atlanta Hilton while Roper was registered there. Record, Vol. II at 218. On the day of the sale, they checked out of their

Ocala motel room and drove to the Mobile Howard Johnson's carrying sealed cartons containing more than 100,000 pills which were quickly transferred to another vehicle. The pair then met with Cobb for a few minutes before heading in the direction of Florida. Truxell's map also contained the names of other conspirators and a notation of Cobb's room number and the Howard Johnson's phone number. While there was no direct evidence that Newton and Truxell knew of the contents of the sealed cartons, their guilt may, of course, be demonstrated by circumstantial evidence and it is for the jury to make or reject inferences supported by proof. E.g., United States v. Mesa, supra. We recognize that it is not enough for the government "merely to establish a climate of activity that reeks of something foul." United States v.

Wieschenberg, 604 F.2d 326, 332 (5th Cir. 1979). Here, though, the jury could properly have found that the evidence established not only a stench, but also that Newton and Truxell helped to create the odor by their knowing participation in the conspiracy. Their reliance on United States v. Littrell, 574 F.2d 828 (5th Cir. 1978) and United States v. Aguiar, 610 F.2d 1296 (5th Cir.), cert. denied, 449 U.S. 827, 101 S.Ct. 91, 66 L.Ed.2d 31 (1980) is misplaced. In Littrell, it was equally reasonable to infer from the evidence that the defendant, who drove a car from which drugs were removed after his departure, was unaware not only of the conspiracy or that he was delivering drugs, but also that he was delivering anything at all. In Aguiar there was no basis for the defendant's complicity other than his presence in a house which

was used in the conspiracy. The evidence here goes far beyond that presented in those cases and was sufficient to allow a reasonable jury to find guilt beyond a reasonable doubt. See United States v. Richards, 638 F.2d 765 (5th Cir.) cert. denied, ____ U.S. ____, 102 S.Ct. 669, 70 L.Ed.2d 638 (1981).

Finally, Newton, Truxell and Roper challenge the severity of their sentences and the sentencing procedure employed by the trial court in assessing their penalties. They claim that the sentences were not "individualized" and therefore the judge did not properly exercise his sentencing discretion.

It is well settled that the district court has broad discretion in prescribing sentence. United States v. Small, 636 F.2d 126 (5th Cir. 1981); United States v. Hartford, 489 F.2d 652 (5th Cir. 1974). Consequently, the

severity of a sentence imposed within the statutory limits is insulated from appellate review. United States v. Clements, 634 F.2d 183 (5th Cir. 1981); Herron v. United States, 551 F.2d 62 (5th Cir. 1977). See also United States v. Tobias, 662 F.2d 381 (5th Cir. 1981). Nevertheless, the judicial process by which a sentence is determined is subject to appellate scrutiny. Clements, 634 F.2d at 186; Hartford, 489 F.2d at 654. See also Dorszynski v. United States, 418 U.S. 424, 443, 94 S.Ct. 3042, 3052, 41 L.Ed.2d 855, 868-69 (1974); Tobias, 662 F.2d at 388-89, United States v. Cimino, 659 F.2d 535 (5th Cir. 1981). There is a duty to exercise this discretion in every case and to give "individual" consideration to each particular defendant. See Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337

(1949); Hartford, 489 F.2d at 654. Reduced to practical terms, this means that the judge must consider the mitigating and aggravating circumstances of every case and then exercise his judgment to "fit the sentence to the crime and to the defendant." Hartford, 489 F.2d at 656, quoting Stevens v. Warden, 382 F.2d 429, 433 (4th Cir. 1967). See Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959). Thus, appellate courts have disapproved of rigid and mechanical sentencing procedures by which the district court bypasses the defendant's individual circumstances and metes out a sentence based on the category of crime. See Clements, 634 F.2d at 186-88; United States v. Cavazos, 530 F.2d 4, 6 (5th Cir. 1976); Hartford, 489 F.2d at 655. It is against this background of case law that the appellants make

their allegations of impropriety.

Newton, Truxell and Roper received the maximum sentence allowed by the statute. See 21 U.S.C. §§841(b)(1)(B), 846. At the sentencing hearing, the judge indicated that he would entertain a motion for a reduction of the sentences if the appellants' appeals were affirmed. He went on to state that he felt the maximum was appropriate at that time because in the event the cases were reversed on appeal, the next trial judge would have the freedom to impose whatever sentence he felt necessaary. Record, Vol. IV, at 785, 793-94. These statements, considered in the context of the entire record, do not suggest the use of a rigid or mechanical sentencing policy as those terms are generally understood. Pre-sentence reports were ordered and compiled on each defendant. The judge read the reports and,

at the sentencing hearing, questioned the defendants and their attorneys on the contents. He gave each defendant a chance to clear up any problems or inaccuracies reflected in the report. There is no suggestion or even allegation that the district court stated that he "routinely" meted out maximum sentences in drug cases. Nor is there any hint of such a consistent disposition in similar cases.

While our review of the sentencing hearing reveals no predisposition on the part of the district judge toward maximum sentences for this type of offense, or evidence of a "mechanical" sentencing approach, we cannot reconcile the court's announced purpose with the principles enunciated in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In Pearce, the Court adopted

the rule that a judge may not impose a more severe sentence after a retrial unless the record discloses "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings." 395 U.S. at 726, 89 S.Ct. at 2081, 23 L.Ed.2d at 670. In this instance it is obvious that the sentencing judge exacted the maximum punishment, at least in part, out of a desire to protect another judge's sentencing prerogative in the event of a reversal and retrial. Thus, the second judge would be free to invoke any penalty up to the maximum without following the requirements of Pearce. This declared intention of the district court had the practical effect of avoiding the consequences of the Pearce mandate and is not consonant with the policy, espoused by the Supreme Court.

Also, we are not persuaded by the court's offer to reconsider the sentences in a Rule 35 proceeding if the convictions were affirmed on appeal. This statement of the judge amounts to nothing more than a conditional sentence, reserving the final judgment until after the appellate results were known. In this posture, the case must be remanded to enable the district court to exercise his sentencing discretion.

For the foregoing reasons, the judgments of conviction are AFFIRMED, and the case REMANDED for resentencing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7880.

UNITED STATES of America,

Plaintiff-Appellee,

versus

CHRISTIAN MATTHEW NEWTON and
JOHN JACKSON MILLER TRUXELL,

Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Alabama

ON PETITION FOR REHEARING
(October 19, 1982)

Before GODBOLD, Chief Judge, MERRITT*, and HENDERSON, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ ALBERT J. HENDERSON
United States Circuit Judge

*Honorable Gilbert S. Merritt, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.